

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT TILLARD,

Plaintiff,

-v-

9:10-CV-0344 (NAM)(DEP)

D. PRUCKNO, Correctional Officer,

Defendant.

APPEARANCES:

Robert Tillard
08-B-3953
Fishkill Correctional Facility
P.O. Box 1245
Beacon, New York 12508
Plaintiff, *pro se*

Hon. Eric T. Schneiderman, Attorney General of the State of New York
Adam Silverman, Esq., Assistant Attorney General
The Capitol
Albany, New York 12224
Attorney for Defendant

Hon. Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Correctional Services, brought this action for monetary relief under 42 U.S.C. § 1983. Defendant's motion (Dkt. No. 12) to dismiss the complaint, Fed. R. Civ. P. 12(b)(6), was referred to United States Magistrate Judge David E. Peebles pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). Magistrate Judge Peebles issued a Report and Recommendation (Dkt. No. 17) recommending that the motion be denied as to the first cause of action and granted as to the second and third causes of action.

Plaintiff objects to the recommended dismissal of the second and third causes of action. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews *de novo* those parts of a report and recommendation to which a party specifically objects. Upon *de novo* review, according this *pro se* plaintiff the lenience to which he is entitled and viewing the allegations in the light most favorable to him, the Court agrees that the second cause of action fails to state a claim under the Eighth Amendment. Likewise, applying the same standard to the third cause of action, the Court finds that it fails to state a substantive due process claim under the Fourteenth Amendment. The Court also agrees with Magistrate Judge Peebles' recommendation to deny dismissal of the first cause of action for retaliation.

It is therefore

ORDERED that the Report and Recommendation (Dkt. No. 17) of United States Magistrate Judge David E. Peebles is accepted; and it is further

ORDERED that defendant's motion (Dkt. No. 12) is granted in part and denied in part; that plaintiff's second and third causes of action are dismissed with leave to file an amended complaint within thirty (30) days from the date of this Memorandum-Decision and Order; and that dismissal of plaintiff's first cause of action for retaliation is denied; and it is further

ORDERED that defendant's time to answer the complaint is stayed pending further order.

IT IS SO ORDERED.

March 1, 2011
Syracuse, New York


Norman A. Mordue
Chief United States District Court Judge